IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 7, 2007 Session

NICHOLAS J. RENO, ET AL. v. SUNTRUST, INC., ET AL.

Appeal from the Chancery Court for Hamilton County
No. 05-1202 Howell N. Peoples, Chancellor

No. E2006-01641-COA-R3-CV - FILED MARCH 26, 2007

This appeal presents the issue of the enforceability of an arbitration provision contained in a contract for credit life insurance. After the death of her husband, Linda Reno brought this action to enforce the credit life insurance agreement entered into between the Renos and SunTrust, Inc.[1] that provided for cancellation of the Renos' mortgage debt in the event one of them died. SunTrust filed a motion to compel arbitration, which the trial court denied, finding the arbitration provision unenforceable. We hold that the arbitration agreement is supported by the parties' mutual assent, and that it is not unconscionable. We therefore vacate the trial court's judgment and remand with direction to order the parties to proceed with arbitration.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Marcia Meredith Eason and Robert F. Parsley, Chattanooga, Tennessee, for the Appellant, SunTrust, Inc.

Joshua H. Jenne, Cleveland, Tennessee, for the Appellee, Linda Reno.

OPINION

I. Background

---

[1] At the time the Renos contracted with the Appellant bank, it was named National Bank of Commerce, Inc. That entity subsequently merged with SunTrust, Inc., which is National Bank of Commerce's successor in interest. For ease of reference, we refer to the Appellant bank as "SunTrust."

In February of 2002, Mr. and Mrs. Reno went to SunTrust and sought refinancing of their home mortgage and other debt. The Renos dealt with Carolyn Lynn, who was an assistant vice-president and manager at the bank, and also a personal acquaintance of the Renos. The Renos inquired about obtaining credit life insurance for the refinanced debt, and Ms. Lynn provided them with a rider form entitled "Credit Guardian Plans: Debt Cancellation/Suspension Rider to Note" ("the Rider"). Mrs. Reno testified that they took the Rider form home with them and had ample opportunity to read it.

At the loan closing on February 8, 2002, both Mr. and Mrs. Reno signed the Rider agreement, along with the other refinancing documents. The Rider contained an arbitration provision providing, among other things, that any dispute "arising out of or relating in any way to this Rider, or to the sale or solicitation of this Rider, shall be settled by arbitration under the provision of the Federal Arbitration Act... ." Mrs. Reno and Ms. Lynn each testified that none of the terms of the Rider were ever discussed, that Ms. Lynn offered no explanation of any of the Rider's terms or conditions, and that although the Renos had the opportunity to ask questions about the Rider, they did not do so.

After Mr. Reno died in May of 2005, Mrs. Reno filed a complaint in Hamilton County Chancery Court alleging that SunTrust had informed her that her claim for life insurance benefits was being denied based upon alleged misrepresentations made by the Renos during the application process. Mrs. Reno sought enforcement of the Rider agreement and requested that the trial court cancel the remainder of her refinanced debt pursuant to the Rider's terms, among other relief.

SunTrust filed a motion to compel arbitration and to stay or dismiss the litigation. Mrs. Reno opposed the motion, arguing that the arbitration provision was never pointed out or explained to them, and that the Renos were entirely unaware of its existence or legal ramifications when they signed the Rider agreement. After a hearing, the trial court denied SunTrust's motion and refused to enforce the arbitration provision.

II. Issue Presented

SunTrust appeals, raising the issue of whether the trial court erred in refusing to enforce the arbitration agreement contained in the Rider.

III. Standard of Review

The issue before us is one of law. Therefore, our review is *de novo* on the record of the proceedings below, and there is no presumption of correctness as to the trial court's conclusions of law. *T.R. Mills Contractors, Inc. v. WRH Enter., LLC,* 93 S.W.3d 861, 864 (Tenn. Ct. App. 2002). The general issue presented here is whether the trial court erred in denying SunTrust's motion to compel arbitration. Although an appeal as of right typically must address a final judgment of a trial court, *see* Tenn. R.App. P. 3(a), this appeal is before us as of right under the Tennessee Uniform Arbitration Act, which provides that an appeal may be taken from an order denying an application to compel arbitration. Tenn. Code Ann. § 29-5-319(a)(1) (2000). *See also T.R. Mills,* 93 S.W.3d at

864-65.

IV. Analysis

A. Mutual Assent

Mrs. Reno's primary attack upon the validity of the arbitration provision stems from her argument that there was no mutual assent to that particular part of the contract. In support of her argument that there was no "meeting of the minds" as to the arbitration agreement, Mrs. Reno points out that neither she, her husband, nor Ms. Lynn as SunTrust's agent, were aware of the arbitration provision at the time of the agreement. Ms. Lynn testified that when she presented the Rider to the Renos, she did not know that it contained an arbitration provision and that she didn't know what arbitration was. In *Rhymer v. 21st Mortgage Corp.,* No. E2006-00742-COA-R3-CV, 2006 WL 3731937, at *3 (Tenn. Ct. App. E.S., Dec. 19, 2006), we noted that "it is for the Court to determine whether an agreement to arbitrate has been properly made before enforcing the arbitration agreement." *See also Taylor v. Butler*, 142 S.W.3d 277, 283 (Tenn. 2004) (stating "[g]enerally, whether a valid agreement to arbitrate exists between the parties is to be determined by the courts...").

The Rider agreement is five pages long. On page two, it contains the following provision:

> **Debtor/Co-Debtor agree(s) that the provision of this Rider takes place in and substantially affects commerce. Debtor/Co-Debtor agree(s) that any dispute arising out of or relating in any way to this Rider, including the solicitation of this Rider shall be settled by binding arbitration. Debtor/Co-Debtor agree(s) to give up the right to seek remedies in court, including the right to a jury trial.**

This provision is in the same size font as the words on the rest of the page, but is the only provision in boldface type.

On the final page, immediately above the signature lines, the Rider contains the following provisions:

> **ARBITRATION**
>
> The amendment of the Note pursuant to this Rider takes place in and substantially affects interstate commerce. Any dispute, controversy, claims, demands, losses, damages, actions or causes of action that You or Your beneficiary, including their respective heirs, personal representatives, successors and assigns (each referred to in this Arbitration section as "claimant") arising out of or relating in any way to this Rider, or to the sale or solicitation of this Rider, shall be settled by arbitration under the provision of the Federal Arbitration Act, 9 U.S.C., section 1, et seq. Such arbitration shall be governed by the

> rules of the American Arbitration Association. The arbitration shall be conducted at Our home office or such other location upon which both the claimant and We agree. The arbitration panel shall consist of three arbitrators, one selected by Us, one selected by the claimant and one selected by the arbitrators previously selected.
>
> If We, a claimant, or a third party have any dispute that is directly or indirectly related to a dispute governed by this arbitration provision, the claimant and We agree to consolidate all such disputes.
>
> The arbitration shall be binding upon the claimant and Us. Any award may not be set aside in later litigation except upon the limited circumstances set forth in the Federal Arbitration Act. The claimant and We give up the right to seek remedies in court, including the right to a jury trial. Judgement upon the award rendered may be entered in any court having jurisdiction thereof. The arbitration expenses shall be borne by the losing party, or by both parties in such proportion as the arbitration shall decide.

These provisions are in the same size and type font as the other words on the page.

As regards Mrs. Reno's argument that there was no mutual assent because the Renos did not read the arbitration provisions, that assertion does not absolve her from complying with the matters agreed to by the contract's written terms, nor does it justify a conclusion that the Renos' agreement, including the agreement to submit to arbitration, was made unknowingly or unwillingly. In *Giles v. Allstate Ins. Co., Inc.,* 871 S.W.2d 154, 157 (Tenn. Ct. App. 1993), we recognized the general rule that a party is presumed to know the contents of a contract he or she has signed:

> "To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contract." 12 Am.Jur., 629. "In this connection it has been said that one is under a duty to learn the contents of a written contract before he signs it, and that if, without being the victim of fraud, he fails to read the contract or otherwise to learn its contents, he signs the same at his peril, and is estopped to deny his obligation, will be conclusively presumed to know the contents of the contract, and must suffer the consequences of his own negligence." 17 C.J.S., Contracts, § 137, pages 489, 490.
>
> 'It will not do, for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted,

> contracts would not be worth the paper on which they are written. But such is not the law.'

Giles, 871 S.W.2d at 157 (internal citations omitted); *See also Pyburn v. Bill Heard Chevrolet,* 63 S.W.3d 351, 359 (Tenn. Ct. App. 2001); *Chapman v. H & R Block Mortg. Corp*., No. E2005-00082-COA-R3-CV, 2005 WL 3159774, at *5-6 (Tenn. Ct. App. E.S., Nov. 28, 2005); *Staubach Retail Services-Southeast, LLC v. H.G. Hill Realty Co.,* 160 S.W.3d 521 (Tenn. 2005); *Flanary v. Carl Gregory Dodge of Johnson City, LLC,* No. E2004-00620-COA-R3-CV, 2005 WL 1277850, at *5 (Tenn. Ct. App. E.S., May 31, 2005).

Mrs. Reno suggests that there is a lack of mutuality regarding the arbitration provision because no representative of SunTrust signed the Rider agreement. In *Staubach,* the Supreme Court considered and rejected a similar mutuality argument, stating as follows:

> A contract "must result from a meeting of the minds of the parties in mutual assent to the terms, must be based upon a sufficient consideration, free from fraud or undue influence, not against public policy and sufficiently definite to be enforced." *Doe v. HCA Health Servs. of Tenn., Inc.,* 46 S.W.3d 191, 196 (Tenn.2001) (citations omitted). In determining mutuality of assent, courts must apply an objective standard based upon the parties' manifestations. *T.R. Mills Contractors, Inc. v. WRH Enters., LLC,* 93 S.W.3d 861, 866 (Tenn. Ct. App. 2002).
>
> * * *
>
> Although the lease refers to a "separate agreement executed by and between Landlord and Broker," the parties never executed a separate agreement. The only evidence of an agreement between H.G. Hill, Staubach, and Southeast Venture is the unexecuted agreement attached to the lease. However, a written contract is not required to be signed to be binding on the parties. *T.R. Mills Contractors, Inc.,* 93 S.W.3d at 865.
>
> * * *
>
> The parol evidence rule does not permit contracting parties to "use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract." *GRW Enters. v. Davis,* 797 S.W.2d 606, 610 (Tenn.Ct.App.1990). Furthermore, to allow a party to a contract to admit that the party signed the contract but to deny that the terms of the contract express the party's agreement would destroy the value of contracts. *See Giles v. Allstate Ins. Co.,* 871 S.W.2d 154, 157 (Tenn.Ct.App.1993). H.G. Hill could have refused to sign the lease if it disagreed with the terms of the brokerage agreement attached to the lease. Instead, H.G. Hill paid the first installment of the commission in accordance with the terms of the brokerage agreement,

> thus expressing its assent to its terms.
>
> Similarly, Staubach and Southeast Venture demonstrated their assent to the brokerage agreement. Although Staubach did not sign the brokerage agreement, its assent to the agreement is demonstrated by its action to enforce the agreement. *See Hillard v. Franklin,* 41 S.W.3d 106, 112 (Tenn.Ct.App.2000). Southeast Venture's acceptance of its share of the first installment of the commission demonstrates Southeast Venture's acceptance of its terms. *See T.R. Mills Contractors, Inc.,* 93 S.W.3d at 866 (noting that assent may be established by the parties' course of dealings). When a party who has not signed a contract demonstrates its assent by performing pursuant to the contract and making payments conforming to the contract's terms, that party is estopped from denying the binding effect of the contract. *Id.* at 866; *see Hoyt v. Hoyt,* 213 Tenn. 117, 372 S.W.2d 300, 305 (1963); *R.J. Betterton Mgt. Servs., Inc. v. Whittemore,* 769 S.W.2d 214, 216 (Tenn. Ct. App. 1988).
>
> * * *
>
> We are required to ascertain the intention of the parties by using the usual, natural, and ordinary meaning of the language contained in the contract. *Guiliano v. Cleo, Inc.,* 995 S.W.2d 88, 95 (Tenn.1999).

Staubach, 160 S.W.3d at 524-26. In the present case, SunTrust's assent to the contract has been established by its performance under the contract. Among other things, SunTrust accepted the Renos' premium payments for the credit life insurance for several years, thus demonstrating its intent to be bound by the Rider agreement. SunTrust has never taken the position that the Rider agreement is invalid or unenforceable. Additionally, we are of the opinion that Mrs. Reno cannot "pick and choose" which provisions in the contract are unenforceable due to lack of SunTrust's signature, while at the same time generally affirming the validity of the contract. *See Benton v. Vanderbilt Univ.,* 137 S.W.3d 614 (Tenn. 2004) (holding that a third-party beneficiary cannot accept the benefits of a contract and at the same time avoid the enforcement of an arbitration agreement in the contract).

Moreover, contrary to Mrs. Reno's argument, the final paragraphs under the "**ARBITRATION**" heading as quoted above make it clear that SunTrust is equally bound to arbitrate claims under the agreement, and equally bound by the arbitrators' decision. SunTrust has given up the same rights to the court and jury system as did the Renos; thus, the cases of *Brown v. Tennessee Title Loans, Inc.,* No. E2006-00887-COA-R9-CV, 2006 WL 2842788 (Tenn. Ct. App. E.S., Oct. 4, 2006), and *Taylor v. Butler,* 142 S.W.3d 277 (Tenn. 2004), relied upon by Mrs. Reno, are distinguishable in this regard. *See Chapman,* 2005 WL 3159774, at *7-8.

As regards Ms. Lynn's failure to point out or explain the arbitration provisions in the Rider, Mrs. Reno has cited no legal authority supporting the notion that a provision in a contract must be

explained by one party to the other in order to be enforceable, nor the notion that a bank employee acting as agent for the bank must be aware of and understand every provision in a contract he or she presents on behalf of the bank in order for such provision to be valid and enforceable. Mrs. Reno does not argue that the arbitration provisions are unclear or ambiguous. The Renos were literate, they had ample time and opportunity to read the Rider agreement and ask questions, and they affirm and seek enforcement of the remainder of the contract. Although Mrs. Reno's arguments are compelling and were well-presented by counsel, we hold the contention that the parties never contracted for the arbitration provisions because of lack of mutual assent to be without merit.

B. Unconscionability

Secondly, Mrs. Reno argues that the arbitration provisions contained in the Rider are unenforceable because of their unconscionability. The Supreme Court addressed this concept in *Taylor v. Butler* as follows in relevant part:

> The question of whether a contract or provision thereof is unconscionable is a question of law. *See Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.,* 709 F.2d 427, 435 n. 12 (6th Cir.1983).
>
> If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term. *See* Restatement (Second) of Contracts § 208 (1981). "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes...." Restatement (Second) of Contract § 208, cmt. a (1981).
>
> Enforcement of a contract is generally refused on grounds of unconscionability where the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Haun v. King,* 690 S.W.2d 869, 872 (Tenn.Ct.App.1984) (quoting *In re Friedman,* 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978)); *see also Aquascene, Inc. v. Noritsu Am. Corp.,* 831 F.Supp. 602 (M.D.Tenn.1993). An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. *Id.*
>
> * * *

> We have previously determined that enforceability of contracts of adhesion generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. *See Buraczynski v. Eyring,* 919 S.W.2d 314, 320 (Tenn.1996). Courts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party. *Id.*

Taylor, 142 S.W.3d at 284-86. The *Taylor* Court found the arbitration provision at issue in that case to be sufficiently one-sided and oppressive so as to be unconscionable, reasoning as follows:

> City Auto has a judicial forum for practically all claims that it could have against Taylor. Indeed, it is hard to imagine what other claims it would have against her other than one to recover the vehicle or collect a debt. At the same time, Taylor is required to arbitrate any claim that she might have against City Auto.

Id. at 286. In contrast to the contract in *Taylor,* there is nothing in the arbitration agreement presented in the instant case that appears oppressively one-sided, beyond the reasonable expectations of an ordinary person, or unconscionable. As already noted, the arbitration requirements apply equally to both parties in this case.

Further, it has not been shown in this case that the relationship between the parties is such that the Renos were in an inherently much weaker and more vulnerable position relative to SunTrust, as was demonstrated in other unconscionability cases. *See Howell v. NHC Healthcare-Fort Sanders, Inc.,* 109 S.W.3d 731 (Tenn. Ct. App. 2003); *Raiteri v. NHC Healthcare/Knoxville, Inc.,* No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. E.S., Dec. 30, 2003). Nor can it be said that the arbitration provisions are "buried" within the contract to the extent that an ordinary person reading the contract would easily miss them. We do not find the arbitration agreement in the present case to be unconscionable.

C. Fraudulent Inducement Claim

Mrs. Reno argues her claim for fraudulent inducement regarding the arbitration provision is not arbitrable and must be remanded to the trial court for further consideration. We do not agree.

The parties in this case agreed that "[a]ny dispute, controversy, claims, demands, losses, damages, actions or causes of action...arising out of or relating in any way to this Rider, or to the sale or solicitation of this Rider, shall be settled by arbitration under the provision of the Federal Arbitration Act." Although Mrs. Reno argues she did not know she was agreeing to this provision, as previously noted, she is presumed to have read and agreed to what she signed. *Giles v. Allstate Ins. Co., Inc.,* 871 S.W.2d 154, 157 (Tenn. Ct. App. 1993). The Supreme Court in *Taylor* held that "[w]hen a contract is controlled by the FAA and contains a broad arbitration clause, claims of

fraudulent inducement are subject to arbitration." *Taylor,* 142 S.W.3d at 282; *see also Berkley v. H & R Block Eastern Tax Services, Inc.,* 30 S.W.3d 341, 344 (Tenn. Ct. App. 2000); *Frizzell Construction Co., Inc. v. Gatlinburg, L.L.C.,* 9 S.W.3d 79, 84 (Tenn. 1999); *Hubert v. Turnberry Homes, LLC,* No. M2005-00955-COA-R3-CV, 2006 WL 2843449 (Tenn. Ct. App. M.S., Oct. 4, 2006). Thus, as did the Court in *Taylor*, we find that the parties agreed to arbitrate a claim of fraudulent inducement and are bound to do so.

V. Conclusion

For the aforementioned reasons, we hold that the arbitration provision in the Rider agreement entered into between the parties is enforceable, and that the trial court erred in refusing to grant SunTrust's motion to compel arbitration. We vacate the trial court's judgment and remand for the entry of an order requiring arbitration. Costs on appeal are assessed to the Appellee, Linda Reno.

_____

SHARON G. LEE, JUDGE